

DATE: July 9, 2004

TO: Members of the Board Committee on Planning, Program Development and Budget

FROM: Office of Certification

SUBJECT: Proposed Amendments to California Rules of Court, rule 983.4 [Out-of-State Attorney Arbitration Counsel] and Out-of-State Attorney Arbitration Counsel Program Rules and Regulations - Request for Public Comment

ATTACHMENTS:

1. Rules of Court, rule 983.4 [Out-of-State Attorney Arbitration Counsel]
2. Proposed Rules of Court, rule 983.4 [Out-of-State Attorney Arbitration Counsel]
3. Out-of-State Attorney Arbitration Program Counsel Rules and Regulations (current)
4. Proposed Out-of-State Attorney Arbitration Program Counsel Rules and Regulations
5. Proposed Certificate form for the OSAAC Program

EXECUTIVE SUMMARY

The Office of Certification (OC) requests that the Board Committee authorize publication of proposed amendments to California Rules of Court, rule 983.4 [Out-of-State Attorney Arbitration Counsel Program] (OSAAC), and proposed amendments to Out-of-State Attorney Arbitration Counsel Program Rules and Regulations ("Rules"), as set forth in Attachments 2 and 4 to this memorandum, for a 45-day public comment period.

In 1998, AB 2086 established a new statutory scheme whereby an out-of-state attorney who meets enumerated requirements is permitted to represent a party in the course of, or in connection with, an arbitration proceeding in California. California Code of Civil Procedure (CCP) section 1282.4 provided that the non-member attorney representing a party in arbitration did not engage in UPL if he or she timely filed a certificate and the attorney's appearance was approved by the arbitral forum. The legislative history to AB 2086 stated the intent of the new law was to adopt "pro hac vice rules" (comparable to the terms set forth in California Rules of Court, rule 983 [Counsel Pro Hac Vice]). At the time of the enactment of the OSAAC program, the State Bar expected a significant number of applications from out-of-state attorneys. Notwithstanding the expectation of great numbers in 2002 and 2003, there were less than 300 each year. However, there were 2,431 Pro Hac Vice applications filed in 2002 and 2,625 in 2003. If these numbers are correct, applications submitted by non-California licensed attorneys to appear in California arbitrations are a small fraction of the applications to appear in state court pursuant to rule 983. It seems unlikely that there were almost 10 times more out-of-state attorneys participating in state court actions than in state arbitrations.

To encourage compliance, the OC has developed a proposed application form for both programs and proposed changes in both the Pro Hac Vice program and the OSAAC program to require that applications must be filed with the State Bar for review prior to filing with the court or arbitral forum.

These changes will improve the State Bar's ability to review the applications to ensure that they contain the required information, encourage compliance, and continue to gather information on arbitrations conducted in California.

In addition, effective November 15, 2004, four new Rules of Court and program rules will take effect, authorizing multijurisdictional (MJP) practice. Specifically, Rule 966 allows out-of-state attorneys to practice in California on

pre-litigation matters. However, if an out-of-state attorney wishes to appear in a California court or arbitral forum, he or she is required to file a Pro Hac Vice or OSAAC application. This will increase telephone, paper and e-mail inquiries from out-of-state attorneys, California members and the public regarding the limitations of rule 966. The OC anticipates that additional staff time and resources will be required to handle such inquiries. Thus a suggested fee increase from \$50 to \$250 has been proposed.

Because the MJP program must become effective on November 15, 2004 and the MJP program will have an impact on OSAAC admissions, a shortened public comment period is requested so that the new rules will become effective simultaneously with the implementation of the MJP Program.

Any questions about this agenda item should be directed to Phyllis Culp at phyllis.culp@calbar.ca.gov or at (415)538-2118.

BACKGROUND

On January 1, 1999, Assembly Bill 2086 ("AB 2086") became effective. AB 2086 amended section 1282.4 of the Code of Civil Procedure ("CCP §1282.4") to permit an out-of-state attorney who meets certain requirements to represent a party in the course of, or in connection with, an arbitration proceeding in California. Among the requirements established by the legislation is a provision specifying that an out-of-state attorney seeking to represent a party in an arbitration proceeding in California must first serve a "certificate" on the State Bar.

In the certificate, the out-of-state attorney must state all of the following: (1) the attorney's residence and office address; (2) the courts before which the attorney has been admitted to practice and the dates of admission; (3) that the attorney is currently a member in good standing of, and eligible to practice law before, the bar of those courts; (4) that the attorney is not currently on suspension or disbarred from the practice of law before the bar of any court; (5) that the attorney is not a resident of the State of California; (6) that the attorney is not regularly employed in the State of California; (7) that the attorney is not regularly engaged in substantial business, professional, or other activities in the State of California; (8) that the attorney agrees to be subject to the jurisdiction of the courts of this state with respect to the law of this state governing the conduct of attorneys to the same extent as a member of the State Bar of California; (9) the title of the court and cause in which the attorney has filed an application to appear as counsel pro hac vice in this state or filed a certificate pursuant to amended CCP §1282.4 in the preceding two years, the date of each application, and whether or not it was granted; and (10) the name, address, and telephone number of the active member of the State Bar of California who is attorney of record.

The legislative history to AB 2086 stated that the intent of the legislation was to adopt "pro hac vice rules" (comparable to the terms set forth in rule 983 of the California Rules of Court) expressly permitting out-of-state attorneys to appear on behalf of clients in arbitration proceedings in California. The rationale appearing in the legislative history was included in the text of the statute as paragraph (i), which states that the Legislature is reacting to the holding of the Supreme Court in *Birbrower v. Superior Court* (1998) 17 Cal.4th 117, mod. at 17 Cal.4th 643a.¹ The sponsors of the bill (including the Securities Industry Association, Dean Witter, Discover & Co., Anheuser-Busch Companies and the California Teachers Association) believed the *Birbrower* decision required legislative modification to authorize explicitly certain practice of law activities involving arbitration by out-of-state lawyers present in California. Accordingly, the State Bar was given responsibilities similar to the State Bar's Pro Hac Vice program, which is governed by California Rule of Court rule 983 and is administered by the Office of Certification. Thus a non-California attorney, representing a party in arbitration, did not engage in UPL if he or she timely filed a certificate and the attorney's appearance was approved by the arbitrator.

¹ In the context of a malpractice action with a counterclaim for fees, the Supreme Court in *Birbrower* found that New York licensed attorneys had engaged in the unauthorized practice of law when they assisted a business client in pre-arbitration negotiations with California based companies. The negotiations took place in California and involved a dispute over a written agreement that was executed in California and that specified that interpretation and enforcement was to be governed by California law. The case has been viewed as prohibiting out-of-state attorneys from representing parties before California arbitration tribunals.

At the time of the enactment of the OSAAC program, the State Bar expected a significant number of applications from out-of-state attorneys. In June 2003, the State Bar reported to the Supreme Court specific information concerning representation in arbitrations by persons not licensed to practice law in California and also supported the repeal of the sunset provision contained in CCP §1282.4.

At the inception of the program in January 1999, the State Bar expected a significant number of applications from out-of-state attorneys appearing in California arbitrations. Between June 1999 and June 2000, the OC received 459 OSAAC certificates; in 2001 and 2002, there were only 224 and 274 applications respectively. The majority received were from a single arbitral forum, the National Association of Securities Dealers (NASD). Given the small number of filings and the small number of arbitral organizations referenced in the applications, in March 2003 the OC mailed 53 survey letters to forums and individuals believed to be conducting arbitrations in California. Seven agencies responded, reporting nearly 7,000 arbitrations for 2002, with a total of 311 out-of-state attorneys. While all responding agencies were aware of the rule, the seven made varying degrees of effort to ensure compliance. A couple mention the requirements in their online rules, another informs out-of-state counsel of the rule but does not mention it in their California rules section, and the remaining organizations depend on the individual arbitrator to inform the out-of-state attorneys of the requirement. There was a pervasive sentiment among the agencies that the enforcement of the requirements is not their responsibility. The groups appear to rely on the arbitrator to inform the out-of-state attorney of the registration requirement. Further, they do not feel they have authority to deny an out-of-state attorney permission to represent a party in arbitration.

In contrast, in 2002 there were 2,431 Pro Hac Vice applications filed and in 2003 there were 2,625. It seems unlikely that there were almost 10 times more out-of-state attorneys participating in state court actions than in arbitrations.

Therefore, to encourage compliance, the OC is proposing changes in both the Pro Hac Vice program and the OSAAC program to require that applications must be filed with the State Bar for review prior to filing with the court or an arbitral forum. In addition, a standardized form has been developed and will be published on the State Bar's web site (see Attachment 5). The goal of the amendments and publication of the form is to encourage compliance and gather information on the participation of out-of-state attorneys in arbitrations conducted in California.

In addition, effective November 15, 2004, four new Rules of Court and program rules will take effect authorizing multijurisdictional (MJP) practice. Specifically, rule 966 allows out-of-state attorneys to practice in California on pre-litigation matters. However, if an out-of-state attorney wishes to appear in a California court or arbitral forum, he or she is required to file a Pro Hac Vice or OSAAC application. This will increase telephone, paper and e-mail inquiries from out-of-state attorneys, California members and the public regarding the limitations of rule 966. The OC anticipates that additional staff time and resources will be required to handle such inquiries. Thus a suggested fee increase from \$50 to \$250 has been proposed.

DISCUSSION

Proposed Amendments to Rule 983.4, California Rules of Court

RULE	EXPLANATION
(a) Definition	<p>Since the only term defined is "Out-of-State Attorney Arbitration Counsel," this provision is reorganized around that term.</p> <p>The requirement of filing the certificate with the State Bar prior to filing with the arbitrators or arbitral forum is added. The language is added to highlight the requirement and foster an increased level of compliance.</p>
(b) The State Bar Out-of-State Attorney Arbitration Counsel Program	<p>Existing language calls for the establishment of a program to implement the Bar's responsibilities for an OSAAC program under CCP §1282.4. The proposed revision updates the language to reflect it is an existing program.</p> <p>The revision also deletes reference to CCP §1282.4, which has a sunset provision of January 1, 2006, so that the program can exist independent of the statute.</p>

RULE	EXPLANATION
(c) Eligibility to Appear as an Out-of-State Attorney Arbitration Counsel	No changes.
(d) Discipline/Revocation of Permission to Appear	The caption for the provision is changed from “Discipline” to “Discipline/Revocation of Permission to Appear”, and a provision added thereunder to specifically state arbitral forums may on their own withdraw permission to appear pursuant to this rule. This addresses the feeling that arbitral forums do not have the authority to deny an out-of-state attorney permission to represent a party in arbitration.
(e) Disqualification	No change.
(f) Fee	The revision authorized the State Bar to set and collect fees. The replacement would bring the OSAAC program in alignment with other programs administered by the Office of Certification per rule of court. Programs with this type of enabling provision in the rule of court all the Board of Governors to fix a reasonable amount to defray the expenses of administering the program and partially defray expenses of administering other responsibilities of the Board relating to the competent deliver of legal services in California.
(g) Inherent Power of Supreme Court	No change.

Proposed Amendments to the Administrative Rules and Regulations for the OSAAC Program

SECTION	EXPLANATION
1.0 Purpose	Existing language states the purpose is to establish an OSAAC program under the statute and rule of court. The revision simply states that the purpose is to administer the existing program.
2.0 Definitions	Language is added to the definition of an Out-of-State Attorney Arbitration Counsel to specifically state that the out-of-state attorney must meet the eligibility requirements of the rules
3.0 Eligibility and Certificate (formerly <i>Eligibility for Filing Certificate</i>)	Language is added to emphasize the eligibility requirements that the out-of-state attorney must meet. Currently, there is merely a reference to information required under CCP §1282.4 (c). Under the proposal, the information specified in that statute is listed in this provision. This offers two advantages. First, required information is set forth in the program’s rules, rather than in a referenced statute. Secondly, in the event that the sunset provision in CCP §1282.4 is not extended by the Legislature, the program could nevertheless stand on the authority of the rule of court without reference to information contained in the sunsetted statute.
4.0 Filing and Service (new)	This is a new provision to clarify that out-of-state attorneys must file the certificate with the State Bar prior to appearing in the arbitration hearing. The provision also specifies that after State Bar review of the certificate, a copy shall be served on specified parties prior to the attorney’s first appearance in the arbitration hearing.
5.0 Duration (formerly section 4.0)	Deleted from the current provision is a statement that the program is terminated under the applicable provisions of CCP §1282.4.

6.0 Disqualification (new)	This is a new provision stating out-of-state attorneys may be disqualified from serving as attorney-of-record in an arbitration and the circumstances for it.
7.0 Discipline (new)	This is a new provision stating the disciplinary jurisdiction of the State Bar of California over the out-of-state attorney and the attorney's obligation to comply with the laws and rules governing the professional conduct of members of the State Bar of California.
8.0 Public Nature of Records (formerly section 5.0)	A good cause exception is inserted to allow the OC to withhold select information contained in 3.1. For example, of concern is public disclosure over the Internet of an attorney's residence address and phone numbers.

FISCAL AND PERSONNEL IMPACT

The proposed information and screening function that OC staff would perform for the courts and the arbitral forums is expected to result in more aggressive checking of applicants' eligibility, and in a greater number of applications for OSAAC being submitted to OC than currently takes place. In 2002 OC, received 274 applications and 241 applications in 2003. It is suspected that not all out-of-state attorneys appearing in arbitrations have filed OSAAC applications with the State Bar. The new process should also enable the State Bar to collect data on the number of OSAAC applicants for the Supreme Court. The more aggressive checking called for by information and screening functions, increased number of submissions, and data collection are expected to have a workload and personnel impact for which a fee increase will be required. Once the MJP program has been implemented, we believe that OSAAC submissions will also increase. Most of the out-of-state attorneys practicing in California pursuant to California Rules of court, rule 966(as part of litigation), will be required to file either a pro hac vice or an OSAAC application if the matter is filed in a California court or arbitral forum. The current fee of \$50 is recommended to be increased to no less than \$250. The rationale for this fee increase will be presented when this item returns from public comment.

PROPOSED BOARD COMMITTEE ACTION

If the Board Committee on Planning, Program Development and Budget concurs with the OC's request for authorization to send the proposal out for public comment, it would be appropriate to adopt the following resolution:

RESOLVED that the Board Committee on Planning, Program Development and Budget authorizes the publication of the proposed amendments to rule 983.4, California Rules of Court, and the proposed amendments to the Out-of-State Attorney Arbitration Counsel Rules and Regulations for a 45-day comment period, in the form attached to these minutes and made a part hereof; and it is

FURTHER RESOLVED that the authorization of publication of said proposed rules for public comment is not at this time to be construed as a final recommendation by the Board on this subject